IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Appeal From Order no.l42 of 2006
with
C.A.No. l86 of 2006

Kishore D Shah and ors ..appellants
vs
Mun Corpn of Gr Mumbai .. respondents

Mr Anil R Mishra for appellants
Ms Geeta Joglekar for BMC respondents

CORAM; A.M.KHANWILKAR J.

DATED 27.2.2006

P.C.

l. Heard the learned counsel for the parties.

2. This appeal takes exception to the order passed by the trial court dated 24.ll.2005 dismissing the notice of motion preferred by the appellant being notice of motion no. l92l of 2005. By the said notice of motion the appellant had prayed for relief of injunction against the respondents, their servants and agents from enforcing the notice dated 2l.2. 2005 and order dated 26.4.2005 respectively. The said notice was issued by the Asst Commissioner K East Ward under section 35l of the MMC Act l888. By this notice three

unauthorised works have been noted as offending.

3. In so far as item nos. 2 and 3 are concerned they pertain to the unauthorised change of user of the ground,first and second floors of the building known as Sterling. According to the corporation, original sanctioned user was for the factory (industrial unit) whereas second floor is now being used as auditorium and wedding hall and ground and first floors partly are being used for office purpose instead of sanctioned user or for factory (industrial unit). In so far as these two items are concerned the Asst Commissioner K East Ward in his notice dated 28.4.2005 has adverted to the order passed by the Building Proposals dated 26.4.2005 which in turn rejected the proposal for change of user. The argument of the appellant that the said order has not been communicated to the appellant is of no avail. The fact remains that the original sanctioned user of the disputed structure i.e. ground, lst and 2nd floors was for factory (industrial unit). There may be sub stance in the argument of the appellant that the original activity which was carried on in the factory was in

respect of manufacture of hazardous rubber chemicals and rubber goods which is known to be hazardous and abutting area now transposed as residential zone for which reason that activity is prohibited. Even so the appellant on their own could not change the user of the premises without obtaining prior permission from the concerned authority. So long as the appellant does not succeed in getting proper permission for converting the sanctioned user for factory (industrial unit) to any other permissible user,it is not open for the appellant to use the said building for any other purpose. The argument that the corporation has also cessed the premises as office/commercial premises is also of no avail. This clearly over looks that the change of user can be permitted only after appropriate authority would accord such permission as per the procedure and on appellant’s compliance with necessary formalities in that behalf. Viewed in this perspective no fault can be found with the ultimate conclusion reached by the court below in rejecting the notice of motion. In so far as the items nos. 2 and 3 referred to in the suit notice are concerned regarding change of user of

permission and requiring the appellant to restore the unauthorised sanctioned user.

5. In so far as item no.l in the suit notice, it makes reference to the unauthorised construction of workshop by fixing rolling shutter to stilt portion admeasuring l5.8 ft x l5.7 ft as shown in the rough sketch appended to the notice. In so far as this structure is concerned, it is not disputed that same has been demolished on l6.2.2006. Indeed, the argument of the appellant is that the concerned officer has precipitated the matter inspite of being informed that the appellant would be moving this court by way of appeal. All these questions will be considered by the trial court at appropriate stage and if necessary relief is sought as may be permissible in law. Suffice it to observe that the relief claimed in the notice of motion in so far as the unauthorised construction of workshop by fixing rolling shutter to stilt portion is worked out and the appellant will have to take recourse to appropriate remedy as may be advised.

6. In so far as the rolling shutter is

concerned the argument of the appellant is that same has been constructed as per the sanctioned plan of l970. The grievance of the appellant is that the sanctioned plan was placed before the trial court but has not been adverted by the trial court in the impugned judgment. Besides the respondent corporation did not choose to file any reply to controvert the case made out by the appellant on affidavit before the trial court that the construction of workshop by fixing rolling shutter to stilt portion was in terms of the sanctioned plan. As mentioned earlier relief claimed in the notice of motion with regard to the unauthorised construction i.e. item no.l in the suit notice is already worked out. All contentions raised on behalf of the appellant in that behalf are left open to be decided in appropriate proceedings, if resorted to by the appellant.

7. The counsel for the appellant on instructions states that this matter was called out in the morning sessions and was kept after lunch break. In the meanwhile officials of the corporation forced into the suit premises and have taken photographs of the site. This fact

is disputed by the learned counsel for the corporation. However, even that aspect is left open to be decided in the appropriate proceedings to be resorted by the appellant if so advised. The counsel for the corporation fairly states that in so far as item nos. 2 and 3 in the suit notice,referable to change of user of the disputed premises is concerned,there is no question of demolition of any portion thereof as that is not the purpose of issuance of the notice under section 35l of the Act. In view of this assurance no further directions are required to be passed in the present proceedings.

8. This appeal and the civil application are disposed of leaving all questions open as referred to earlier.